Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

DAVID McKINNEY AND SYLVIA McKINNEY,

Petitioners,

v.

THE IRVING INDEPENDENT SCHOOL DISTRICT, PATRICIA KIRKSEY, SANDRA MAYES, and MADELEINE TEAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fifth Circuit may permissibly impose the "heightened standard of pleading" this Court rejected in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* in a civil rights case based on a "state created danger" theory.

Whether a court may rely on factual conclusions drawn from outside the record in determining that a requested pleading amendment should be denied on the ground of futility.

PARTIES TO THE PROCEEDINGS

PETITIONERS

Petitioners are individuals David McKinney and Sylvia McKinney. Both petitioners are individual citizens of the United States, residing in the Northern District of Texas. Petitioners have no corporate affiliations. Petitioners were the plaintiffs in the District Court, and Appellants in the Fifth Circuit Court of Appeals.

RESPONDENTS

The Irving Independent School District is a school district organized under the laws of the State of Texas and operating in and around Irving, Texas, which is located in Dallas County, Texas. Patricia Kirksey, Sandra Mayes and Madeleine Teal, individual citizens of the United States, reside in the Northern District of Texas, and were, at all relevant times, employed by the Irving Independent School District.

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OPINIONS BELOW

The opinion of the district court is unreported, and is appended hereto at Appendix 14-28. The opinion of the Fifth Circuit Court of Appeals is reported at 309 F.3d 308, and is appended hereto at App. 1-13.

STATEMENT OF JURISDICTION

The District Court entered an Order Granting Respondents' Motion to Dismiss on January 24, 2001, which order disposed of all claims and all parties. Final judgment was entered on that date. The Decision and Judgment of the Fifth Circuit Court of Appeals was entered on October 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONST., AMEND XIV:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. . . .

FED. R. CIV. PROC. RULE 8(a)(2):

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

FED. R. CIV. PROC. RULE 12(b)(6):

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief may be granted. . . .

FED. R. CIV. PROC. RULE 15(a):

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

STATEMENT OF THE CASE

Petitioners David and Sylvia McKinney brought this action against Respondents after David McKinney, a

teacher and former police officer employed by Respondent Irving Independent School District, was assaulted by a student while driving the school bus.

From August, 1996 through the end of 1997, McKinney served as a certified special education teacher at Respondent District's "Gilbert Transitional Center." The Gilbert Center is the campus to which the District, as a matter of policy, concentrates and sequesters all students with a documented level of severe behavioral, emotional and/or mental problems, and only such students attend Gilbert. See Original Complaint, relevant excerpts of which are appended hereto. App. at 31-2, 35-37, 39. Respondent District segregates these students at Gilbert in order to provide stringent supervision, discipline and structure for students it is no longer willing to educate in mainstream classrooms. App. at 32-33. For most of the students, Gilbert is the least restrictive environment remaining to them short of a juvenile detention center, and security is heavily emphasized on the campus, which features a teacher and a teacher's aide in every classroom, and an on-campus police officer. App. at 32-33, 46. Respondents Mayes, Kirksey and Teal are employees of the District responsible for implementing policies with respect to the Gilbert Center. App. at 38-39.

Impressed with his teaching abilities and his background as a former police officer, Respondents eventually recruited McKinney to drive the bus used to transport the Gilbert students. McKinney agreed,[1] but immediately

[1] When he was driving the bus, McKinney's employer was Dallas County Schools, another governmental entity. Dallas County Schools has never been a party to this case. Respondents, however, had sole

(Continued on following page)

learned that while Respondents imposed stringent codes of behavior on campus, all oversight and enforcement was removed when the students moved from the classroom to the bus. App. at 32, 38-40. See also Petitioner's Appellate Brief, relevant excerpts of which are appended hereto. App. at 46, 48, 50 and note 7 below. Indeed, Respondents adopted a policy prohibiting all aides or safety monitors from riding the Gilbert bus, even though such monitors were available. App. at 36-40. They also prohibited drivers, including McKinney, from enlisting the assistance of friends or relatives to keep an eye on students. App. at 37-38 (Respondents had sole authority to approve the presence of any monitor on the bus). See also App. at 47, 49-50 and note 7 *infra*. And though McKinney and the other drivers repeatedly notified Respondents that their policy was flawed, as evidenced by the violent and unsafe behavior occurring on the bus on a daily basis, Respondents refused to use the disciplinary authority that they alone possessed to remedy the situation. App. at 33-34, 39-41. Respondents failed to use their authority to revoke the bus privileges of offenders, to make alternative transportation arrangements for them, or to impose discipline on the bus. App. at 33-34, 39-41, 48-49. Indeed, on one occasion, Respondent Kirksey demanded that a safety monitor riding McKinney's bus without her prior approval be *removed*. App. at 50. On another occasion, Respondents asked the on-campus police officer to refrain from writing so many tickets to Gilbert students for infractions committed on the bus. App. at 48. Respondents' failure to respond to the reports of ongoing violence, and to impose

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authority to determine the relevant conditions under which the bus was operated. App. at 37-8.

discipline reflected school district policy and sent a clear message to the Gilbert students: they would be made to behave while at school, but would not be held accountable for bad behavior on the bus. The students received the message and acted accordingly. David McKinney was assaulted by one of those students while driving through morning rush hour traffic on November 17, 1999. App. at 33. He continues to suffer from the injuries he received as a result of that assault.

The McKinneys filed suit, claiming that Respondents violated David McKinney's right to bodily integrity, protected by the Due Process Clause of the Fourteenth Amendment, a violation made actionable by 42 U.S.C. § 1983. The McKinneys invoked the district court's jurisdiction under 42 U.S.C. § 1983, and under 28 U.S.C. § 1331 (general federal question jurisdiction). The McKinneys argued that Respondents were liable under a theory of Section 1983 liability known as the "state created danger" theory, which recognizes that if state actors "knowingly place a person in danger, the due process clause of the Fourteenth Amendment to the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'" *Johnson v. Dallas Independent School District*, 38 F.3d 198, 200 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). "Although different facts underlie each of these cases, the courts uniformly held that state actors may be liable if they created the plaintiffs' peril, increased their risk of harm, or acted to render them more vulnerable to danger." *Johnson v. DISD*, 38 F.3d at 200. Although it is Petitioners' position

that such a theory of liability is permitted – if not commanded – by the express language of 42 U.S.C. § 1983, the Fifth Circuit has declined to formally "accept" this theory over the past decade.

Given the Fifth Circuit's refusal to formally acknowledge the viability of these claims, Respondents filed a motion to dismiss the action on that basis, arguing that because the "state created danger" theory was not viable in the Fifth Circuit, dismissal under Rule 12(b)(6) was proper. Respondents, however, never attacked the factual sufficiency of Petitioners' pleading, nor did they claim lack of fair notice.

The trial court granted the Rule 12(b)(6) dismissal, but not on the ground advanced by Respondents. Instead, the court concluded, *sua sponte,* that the McKinneys' pleading failed to allege sufficient facts to support the "state created danger" claim. Although the court dismissed the case on the basis of pleading deficiencies to which McKinney had never been alerted, the court went on to deny leave to amend the complaint, holding that any amendments would be futile because McKinney was not compelled to drive the bus. App. at 20-21, 26.

Petitioners appealed the decision to the Fifth Circuit Court of Appeals, but the court affirmed. As with every other "state created danger" case to come before it after a Rule 12(b)(6) dismissal, the Fifth Circuit concluded that Petitioners did not adequately plead the elements of the theory. The court also upheld denial of leave to amend, though it did not adopt the reasoning of the trial court, stating only that "[T]heir [Petitioners'] appellate brief and questioning at oral argument reveal that the McKinneys cannot adequately allege deliberate indifference . . . ," so

remanding the case would do nothing but "prolong the inevitable." App. at 13.

Petitioners therefore timely filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

During the past ten years, the Fifth Circuit has reviewed numerous "state created danger" cases like this one, but has declined to decide whether the theory is a viable one. Instead, the court has disposed of each such case due to insufficient pleadings or evidence, a result it reaches after "assuming" that the "state created danger" theory is viable for the purpose of analysis. Though the court acknowledges as a general proposition that Rule 12(b)(6) dismissals are "viewed with disfavor and ... rarely granted," *Lowrey v. Texas A&M University System,* 117 F.3d 242, 247 (5th Cir. 1997), the court has never found a single "state created danger" pleading that has passed muster, despite having reviewed such cases numerous times over the past decade.

Petitioners contend that the Fifth Circuit did not, in fact, "accept" the viability of the "state created danger" theory when it evaluated the sufficiency of their pleading. Instead of rejecting the "state created danger" theory on its merits, however, the court disposed of this case – and other "state created danger" cases to come before it – by imposing the heightened pleading standards contemplated in Rule 9(b), a practice this Court rejected in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163 (1993).

The Fifth Circuit exacerbated this error by weighing the importance of the factual allegations made in the complaint – emphasizing some and disregarding others – and by drawing legal conclusions based upon that impermissible fact-finding. Such tactics are a clear departure from the standard of review applicable to motions to dismiss under Federal Rules of Civil Procedure 8(a)(2) and 12(b)(6), and this case presents an opportunity to correct an error that has the potential to impact every case filed in the Fifth Circuit.

Finally, the Fifth Circuit's denial of leave to amend represents a gross misapplication of Rule 15(a), which directs that leave to amend pleadings "shall be given when justice so requires," but allows courts to deny leave if an amendment would be futile. Departing from the clear mandates of both *Conley v. Gibson,* 355 U.S. 41 (1957) and *Foman v. Davis,* 371 U.S. 178 (1962), the Fifth Circuit decided that granting leave to amend would be futile here because it concluded – on the basis of unidentified statements in Petitioners' brief and oral argument, *see* App. at 13 – that McKinney would never be able to show that the Respondents increased the level of danger over that which was "ordinary," or "inherent" to his job. That being the case, McKinney could never hope to plead facts demonstrating that Respondents acted with deliberate indifference. App. at 10-11. The futility conclusion, based as it is on impermissible conclusions about the nature and quality of facts McKinney might be able to plead in the future, and about the "ordinary" and "inherent" risks of his job, allows the futility exception to completely swallow the rule. It is difficult to imagine a situation in which a court would not be able to find futility if it is permitted to engage in such fact-finding. This Court should take the

opportunity to correct an error that will have a recurring impact on cases filed in the Fifth Circuit.

As Judge Robert Parker pointed out in a recent vigorous dissent in *McClendon v. City of Columbia*, 305 F.3d 322, 333 et seq. (5th Cir. 2002), the Fifth Circuit has persistently interposed procedural hurdles like these in order to avoid deciding this unresolved question of civil rights law: whether the "state created danger" theory of liability is viable. This Court should grant certiorari in both this case and *McClendon*[2] in order to bring a halt to this policy of avoidance, and to reiterate that *Leatherman* means what it says.

I. INSTEAD OF DECIDING WHETHER THE "STATE CREATED DANGER" THEORY IS VIABLE, THE FIFTH CIRCUIT DISPOSES OF SUCH CASES BY IMPOSING THE HEIGHTENED PLEADING REQUIREMENTS REJECTED IN *LEATHERMAN v. TARRANT COUNTY NICU*

Almost a decade ago, this Court put an end to the Fifth Circuit's practice of requiring that those pursuing civil rights claims under 42 U.S.C. § 1983 meet the heightened pleading requirements described in Federal Rule of Civil Procedure 9(b),[3] thereby resolving a conflict among the circuits on that issue. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit [NICU]*, 507 U.S. 163 (1993). Leatherman's case, like McKinney's, was

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[2] Sup. Ct. Docket No. 02-861, petition for certiorari due January 27, 2003.

[3] *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985); *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987).

dismissed under Rule 12(b)(6), but this Court granted Leatherman's petition for certiorari and reversed, finding it "impossible to square the 'heightened pleading standard' with the liberal system of notice pleading established by Federal Rule of Civil Procedure 8(a)(2)." *Leatherman*, 507 U.S. at 168; Fed. R. Civ. P. 8(a)(2). The clear and unequivocal holding of *Leatherman* is that a civil rights claimant is to be treated like any other: he cannot be required to "set out in detail the facts upon which he bases his claim," but need only provide a "short and plain statement of the claim that will give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Leatherman*, 507 U.S. 168 quoting *Conley v. Gibson*, 355 U.S. at 47.

Though *Leatherman* announces a clear rule, one to which the Court has recently emphasized its commitment, *see Swierkiewicz v. Sorema*, 534 U.S. 506, 512-513 (2002), the Fifth Circuit continues to apply a heightened pleading standard in cases not expressly mentioned in Rule 9(b). It applies that standard in civil rights cases against persons sued in their individual capacity, for example. *See Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). And though it now avoids the "heightened pleading" nomenclature, it applies that standard in cases like this one, cases relying on a "state created danger" theory of Section 1983 liability. Petitioners contend that the court has imposed these heightened procedural burdens for years in order to avoid rejecting the "state created danger" theory, potentially creating a clear conflict among the circuits. *McClendon*, 305 F.3d at 333 et seq.

The Due Process Clause of the Fourteenth Amendment prevents state actors from depriving citizens of life, liberty or property without due process. That the "liberty" interest guaranteed by the Due Process Clause includes the right to

bodily integrity has long been recognized. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), citing *Rochin v. California*, 342 U.S. 165 (1952); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *McClendon*, 305 F.3d at 335 (dissent); *Doe v. Taylor Independent School District*, 15 F.3d 443, 450-1 (5th Cir. 1994) (en banc). Recognizing that by its terms, 42 U.S.C. § 1983 imposes liability on every state actor that "subjects, *or causes to be subjected*, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution . . . [emphasis added]," virtually every circuit in this country has concluded that state actors may be held liable when their own conduct creates a special danger to a particular individual's bodily integrity, even when the final injurious blow is inflicted by a non-state actor.[4] This theory

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[4] *Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992), *cert. den'd*, 506 U.S. 837, 113 S.Ct. 113 (1992); *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993); *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc), *cert. den'd*, 516 U.S. 994 (1995) (Petitioners do not "count" the Fourth Circuit as one that has accepted the state created danger theory; however, Petitioners argue it did not clearly reject the theory in *Pinder*, either, but rather left that question open. While the Fourth Circuit sitting *en banc* reversed the panel's decision, it appeared to do so without rejecting the viability of the state created danger theory); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-7 (6th Cir. 1998); *Sargi v. Kent City Board of Education*, 70 F.3d 907, 912-13 (6th Cir. 1995); *Nishiyama v. Dickson County*, 814 F.2d 277, 281 (6th Cir. 1987); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir.), *cert. den'd*, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993); *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *Davis v. Fulton County, Ark.*, 90 F.3d 1346, 1351 (8th Cir. 1996); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Wells v. Walker*, 852 F.2d 368, 370-1 (8th Cir. 1988); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. den'd*, 498 U.S. 938, 111

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of liability has been given several names, including the "snake pit" theory,[5] the "indirect harm" theory, or "the state created danger" theory, the label used herein. Though the Fifth Circuit has had numerous opportunities to accept or reject this theory over the past decade, it has persistently avoided doing so. Instead, it purports to assume the theory is viable for purposes of analysis, but inevitably finds that each claim to come before it suffers from a fatal deficiency of pleading or evidence.

The elements the Fifth Circuit has used to describe the "state created danger" theory of liability have evolved over the years, but in this case, the Fifth Circuit required that Petitioners show that state actors either created or increased the danger to McKinney, and that they acted with "deliberate indifference" by creating (or increasing) a dangerous environment that they knew to be dangerous, and by using their authority to "create an opportunity that would not otherwise have existed for the third party's crime to occur."[6] App. at 9, quoting *Johnson v. Dallas*

S.Ct. 341, 112 L.Ed.2d 305 (1990); *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1262-3 (10th Cir. 1998); *Uhlrig v. Harder*, 64 F.3d 567, 572, n. 7 (10th Cir. 1995), *cert. den'd*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356 (11th Cir. 1989) (Petitioners concede that *White v. Lemacks*, 183 F.3d 1253 (11th Cir. 1999) purports to overrule *Cornelius*. Petitioners would respectfully argue, however, that the *White* case mistakenly equates the state created danger theory.) *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

[5] From *Bowers v. DeVito*, 686 F.2d at 618 ("[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.").

[6] There is some overlap and inconsistency in the elements articulated by the Fifth Circuit, in that the first element requires that state

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Independent School District, 38 F.3d at 201. The *Johnson* case, which also involved a school district, not only set forth the elements of the claim, but it went on to give examples of the kind of conduct that was sufficiently culpable to constitute deliberate indifference: actions like placing the plaintiff in a unique, confrontational encounter with a violent criminal, abandoning a known criminal in front of the student plaintiff's school locker, or fostering or tolerating anarchy at school. *Johnson*, 38 F.3d at 202.

McKinney's complaint contained more than ten pages of specific factual allegations which, taken together and read in the light most favorable to him, describe nothing if not a policy of fostering and tolerating anarchy on the school bus he drove, the very sort of conduct cited by *Johnson* as the sort that could give rise to liability. He alleged that Respondents concentrated and segregated the most troubled and violent students into one school and transportation population, increasing danger. App. at 31-2, 35-37, 39. He alleged that Respondents determined the mix of students to ride the bus, and that troubled students ranging in age from 5-22 years would be mixed together on the bus for up to three hours per day, increasing danger. App. at 32, 36-7, 39-40. A reasonable inference to be drawn

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actors create *or* increase the danger to the plaintiff, while the definition provided for deliberate indifference states that the state actors had to create the dangerous environment. App. at 9. However, other portions of the opinion reveal that the Fifth Circuit acknowledges that increasing the danger is sufficient. See App. at 10 (McKinney did not "allege any facts showing that defendants took any affirmative action to *increase* the risk. . . . "). This is consistent with other recent articulations of the theory by the Fifth Circuit. *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995) (plaintiff must show defendant increased the danger).

from these facts, argued by McKinney on appeal, was that segregation of students with documented behavioral problems into one population isolated them from the mediating influence of other students without such problems, which increased McKinney's danger by cutting him off from people who could have helped or warned him. See App. 47-8.[7] He alleged that while Respondents imposed stringent discipline in the classroom, their policy was to remove that discipline and supervision when the students were put on the bus. App. at 36-40. He argued on appeal that Respondent Kirksey had in fact removed a monitor placed on his bus without her approval. App. at 50. He argued on appeal that the trial court should therefore have drawn the reasonable inference that removal of discipline, together with Respondents' refusal to take disciplinary action when informed of the danger, actually emboldened the students, increasing the danger to McKinney. App. at 48; *Sharp v. City of Houston*, 164 F.3d 923, 935 (5th Cir. 1999) (city tolerance of officers' "code of silence" encouraged such conduct); *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993) (state actors can create a danger by deliberately letting criminals know that the police will "look the other way" while criminals commit crimes); *Fenstermaker v. Nesfedder*, 802 F.Supp. 1258 (E.D. Pa. 1992), *aff'd in part and vacated in part, other grounds*, 9 F.3d 1540 (3rd Cir. 1993) (school liable for increasing danger when coach, who did not participate, stood by and allowed students to engage in a hazing ritual). He alleged

[7] To the extent that this was not a reasonable inference to be drawn from the facts pleaded, McKinney argued on appeal that this was the very sort of fact that could have been added to an amended pleading, had one been allowed.

that Respondents had sole control over who rode the bus, sole authority to appoint a monitor, and argued on appeal that a reasonable inference to be drawn from this sole control was that Respondents permitted *no person* not previously approved by them to ride the bus to help McKinney – no monitors, no students, no friends, no relatives, no volunteers. App. at 37-8, 47, 50.[8] These allegations demonstrated that Respondents were, at a *minimum*, behaving in a manner that was "willfully blind" to the problems on the bus, enough to constitute deliberate indifference, even in the Fifth Circuit. *Leffall v. Dallas Independent School District*, 28 F.3d 521, 531 (5th Cir. 1994) ("deliberate indifference" can be established with proof that an unusually serious risk of harm existed, that defendant had actual knowledge of, ***or was willfully blind to***, the elevated risk, and that defendant failed to take obvious steps to address the risks, citing cases.).

Despite the fact that McKinney's complaint contains factual allegations for each element of the "state created danger" claim, allegations at a level of factual specificity above that required by Rule 8(a)(2), the court of appeals concluded that those allegations were insufficient to set forth a "state created danger" claim. For example, though McKinney identified specific conduct that increased his danger, the court stated that he did not include such allegations. It faulted him for failing to allege that Respondents' actions or inactions made him more vulnerable to attack *on November 17, 1999* – the day of his assault – than on any other day of the year, *see* App. at 11, but it

[8] See note 7.

cited no legal authority for imposing this pleading requirement, nor does such authority exist in the Fifth Circuit or elsewhere. Proving that the danger to the plaintiff is uniquely severe on the day that an injury is inflicted is simply not part of the "state created danger" plaintiff's case. It faulted him for failing to allege instances of "affirmative conduct," *see* App. at 10, while acknowledging in another part of its opinion that allegations of actions *or inaction* would suffice, so long as the danger to McKinney was increased. App. at 11. While McKinney *did* allege affirmative conduct, he also relied on previous Fifth Circuit precedent holding that a persistent failure to promulgate a policy could demonstrate deliberate indifference and support liability in a Section 1983 case. *Doe v. Taylor Independent School District*, 15 F.3d 443, 454 (5th Cir. 1994) (en banc); *Gonzalez v. Ysleta Independent School District*, 996 F.2d 745, 760 (5th Cir. 1993) (omissions amounting to intentional choice are actionable). Each of these instances is evidence that the Fifth Circuit demanded that McKinney plead facts not necessary to prove his claim, and that he plead them at a level of specificity not required by Rule 8(a)(2) and *Leatherman*.

The Fifth Circuit's reluctance to accept facts pleaded as true, or to draw reasonable inferences in the pleader's favor, has not been limited to Petitioners' case, but has been endemic to the "state created danger" cases. A striking example of the court's refusal to draw reasonable inferences in another of these cases is found in *McClendon v. City of Columbia*.[9] In that case, a Columbia police officer

[9] *McClendon* was a case in which the Fifth Circuit was reviewing the propriety of the trial judge's summary judgment dismissal, not a

(Continued on following page)

loaned a gun to a police informant named Loftin, who then used the gun to shoot McClendon. McClendon brought a "state created danger" claim against the city and the officer, arguing that the police officer increased the danger to him by loaning Loftin the gun when he knew the two were in a dispute. Though conceding that McClendon's summary judgment evidence had established that the officer had in fact lent the gun to the informant Loftin, and had done so even after learning that Loftin actively feared that McClendon would harm him due to a prior dispute between the two, the Court concluded that there was no reason to believe the two would have an encounter, or that Loftin would use the gun against McClendon. *McClendon*, 305 F.3d at 326. No court purporting to construe these facts in favor of the non-movant could have reasonably concluded that the police officer had no reason to know that the gun would be used in precisely the manner it was used. Based on the information available to the officer, the two most likely reasons for Loftin to have needed that gun were: 1) to defend himself from a foreseeable attack by McClendon, or, 2) to use it in a confrontation with McClendon that he initiated. Once again, however, the Fifth Circuit refused to resolve that factual question in McClendon's favor, just as it has refused to construe McKinney's complaint in his favor.

Although the Fifth Circuit has, consistently stated that it *accepts* the "state created danger" theory as viable

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Rule 12(b)(6) dismissal. But because a court reviewing summary judgment evidence is bound to resolve factual disputes in favor of the non-movant, the comparison is relevant. *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997).

for the purposes of analyzing cases like McKinney's, its overly stringent review of Rule 12(b)(6) and summary judgment dismissals clearly reflects the court's reluctance to accept the central premise of that theory: that deliberately indifferent conduct committed by a state actor can give rise to liability even when the injury-causing blow is delivered by a third person. When the court perpetually refuses to accept or believe pleading allegations that such conduct *does* create or increase danger to the plaintiffs before it, and when it consistently concludes that no set of facts is ever enough, it is simply manifesting its conclusion, as a matter of law, that such facts cannot give rise to liability under 42 U.S.C. § 1983. The court, however, should make that decision as a matter of substantive law instead of engaging in procedural charades that are contrary to this Court's directives in both *Conley v. Gibson* and *Leatherman*.

That the Fifth Circuit has imposed such procedural hurdles in what has become a decade-long effort to avoid deciding this very question is the central point in Judge Robert Parker's vigorous dissent in *McClendon:*

> The only way to explain the majority opinion is that it clearly reflects a court that aspires to be the only circuit in the country to reject the state-created danger theory but cannot bring itself to admit it. Instead, the Court has embarked on a ten-year course of back-door rejection by assuming *arguendo* that the theory is viable and then finding that the victim has just not made the case. . . . [an] analytical approach . . . the Supreme Court has told us not to employ. The Court's *modus operandi* in these cases plays like a broken record – same approach, same result, and same

> confusion created for the district courts, state officials, and the general public concerning this Circuit's position on this important issue. In choosing to play this broken record yet again, the majority skirts the central issue in the case: Whether the substantive component of the Due Process Clause guarantees a citizen the right to be free from acts of violence inflicted by a third party when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury.

McClendon, 305 F.3d at 334, 335. As Judge Parker notes, the Fifth Circuit's practice has had – and will continue to have – serious negative consequences for civil rights claimants in that circuit. First, the stratagem it uses to avoid deciding the "state created danger" question imposes pleading burdens on claimants in excess of those permitted by Rule 8(a)(2). Second, its refusal to decide the question leaves the law with respect to those "state created danger" claims very uncertain. *See*, e.g., App. at 19, n. 3. Finally, the Fifth Circuit's refusal to do what it clearly wishes to do – reject the "state created danger" theory – precludes any review by this Court of the propriety of its view. *McClendon*, 305 F.3d at 338, n. 23.

David McKinney's complaint contains allegations on each element of his complaint. Under *Leatherman, Conley*, and Rule 8(a)(2), he cannot be required to "set out in detail the facts upon which he bases his claim," so long as his short and plain statement provides fair notice. *Leatherman*, 507 U.S. 168; *Conley v. Gibson*, 355 U.S. at 47. No one – no party and no court – has alleged that McKinney's complaint failed to provide Respondents with fair notice. If the simple and brief statements found in the Federal Rules of Civil Procedure Forms satisfy Rule 8(a)(2), as this

Court has ruled – *see Sorema*, 534 U.S. at 513, n. 4 and *Conley v. Gibson,* 355 U.S. at 47 – then McKinney's complaint surely met the test. If this Court does not hold the Fifth Circuit to the Rule 8(a)(2) pleading standard, these problems will continue with no resolution in sight.

II. HAVING APPLIED A HEIGHTENED PLEADING STANDARD TO THIS "STATE CREATED DANGER" CLAIM, THE FIFTH CIRCUIT COMPOUNDED ITS ERROR WHEN IT FAILED TO TAKE THE FACTS PLEADED AS TRUE, IN DIRECT CONFLICT WITH WELL-ESTABLISHED LAW.

Not content to apply a heightened pleading standard to McKinney's case, the Fifth Circuit compounded its error by abandoning the deferential standard of review dictated by *Conley v. Gibson* and its progeny, a standard of review that demands that appellate courts construe all facts in the complaint as true and in the light most favorable to the pleader, and that they draw reasonable inferences in the pleader's favor. *See, e.g., Leatherman*, 507 U.S. at 154; *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). Indeed, when reviewing a Rule 12(b)(6) dismissal, appellate courts are bound to *presume* that general allegations embrace all specific facts that are necessary to support the claim. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). Rule 12(b)(6) does not "countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). A court of appeals may not uphold a Rule 12(b)(6) dismissal unless it appears beyond doubt that the claimant can prove no set of facts in support of the claim. *Conley v. Gibson*, 355 U.S.

at 45-6; *Johnson v. Dallas Independent School District*, 38 F.3d 198, 199 (5th Cir. 1994).

In this case, rather than heed well-established rules of law, the Fifth Circuit plainly disbelieved McKinney's express and repeated allegation that Respondents' conduct increased his danger. And it disbelieved these statements because it had drawn its own factual conclusions about the nature of McKinney's environment. Specifically, it concluded that because the "inherent" level of risk on McKinney's job was created solely by students, Respondents' conduct was irrelevant. App. at 10-11 (McKinney cannot allege facts demonstrating that Respondents increased danger over "inherent" or "ordinary" level). In other words, it finds that McKinney's pleadings fail to implicate Respondents as a matter of law because he cannot escape the fact that Respondents were not his assailants. This is a factual conclusion that the court is not permitted to draw, but it also reflects what must be a legal conclusion, one that is inconsistent with the court's insistence that it has assumed the validity of the "state created danger" theory for purposes of analysis. That Respondents were innocent of creating any danger for McKinney does not follow inexorably from the conclusion that students played a role in creating the danger *unless* the court has, *sub silentio*, concluded that state actors can only be liable if they "create danger" for the plaintiff by directly inflicting injury upon him. If the Fifth Circuit had actually accepted the legal proposition that Respondents' conduct contributed to the danger in a manner that could subject them to liability under Section 1983 even where a third party inflicted the blow, its conclusion that there was some unstated level of danger "inherent" in McKinney's workplace should not have ended the inquiry. That it *did* end the inquiry is

evidence that the Fifth Circuit simply cannot accept that state actors can be held liable under section 1983 when the injury-causing blow is inflicted by a third party. Instead of overtly rejecting the theory, however, the court hides behind the niceties of the pleading rules, finding complaint after complaint inadequate.

If the allegations in McKinney's complaint are accepted as true, he must prevail. As stated above, that complaint contained pages of specific factual allegations that Respondents created or increased the danger of the bus driving work, that they knew of the danger, and that they created an opportunity for harm that would not otherwise have existed. See pp. 3-4, 13-16 *supra*. The Fifth Circuit simply discounted these allegations, holding instead that McKinney never alleged that Respondents took affirmative action to create or increase the risk. App. at 10-11. The court similarly discounted McKinney's allegations that Respondents' repeated refusal to put a safety monitor on the bus amounted to a policy of willful blindness to his plight, though such allegations will theoretically support liability in the Fifth Circuit if pleaded. *Leffall*, 28 F.3d at 531. It refused to draw the reasonable inference that when Respondents removed the disciplinary measures so stringently imposed in the classroom, they emboldened the students, as they did when they failed to take appropriate action in response to knowledge of the problems occurring on that bus on a daily basis. *Sharp v. City of Houston*, 164 F.3d at 935; *Dwares v. City of New York*, 985 F.2d at 99; *Fenstermaker v. Nesfedder*, 802 F.Supp. 1258.

The standard of review applicable to Rule 12(b)(6) motions does not allow the Fifth Circuit to reach factual conclusions about "inherent" risk levels, nor does it allow the court to *disbelieve* McKinney. In reaching these particular factual conclusions, however, the Fifth Circuit

clearly reveals its hostility to "state created danger" claims, which it will not allow to proceed, but apparently cannot bring itself to reject. *McClendon*, 305 F.3d at 334, 335. When the court discards allegations about the role the Respondents played in creating a dangerous situation – allegations it is bound to accept as true – concluding instead that the danger came only from the party that delivered the actual blow to McKinney, the court of appeals makes clear that it simply does not accept the notion that a state actor can be liable under Section 1983 if the state actor did not actually deliver the injury-causing blow. Instead of engaging in procedural charades, the Fifth Circuit should simply make a decision on the merits of the underlying "state created danger" claim.

In this case, the Fifth Circuit not only found that McKinney did not say enough in his pleading, the court refused to accept what he did say, and drew its own factual conclusions instead. It committed these errors in lieu of making a ruling on the substantive merits of "state created danger" claims. Because the Fifth Circuit's position is contrary to law and has created widespread uncertainty about the precise procedural standards that must be met by civil rights plaintiffs, a problem that will continue, this Court should take this opportunity to correct that error.

III. RELYING ON IMPERMISSIBLE FACTUAL CONCLUSIONS, THE COURT BELOW ERRED IN DENYING PETITIONERS LEAVE TO AMEND THEIR COMPLAINT

Having relied on impermissible factual conclusions to find the pleading insufficient, the Fifth Circuit employs that same analysis to find that any future pleading would do nothing but "prolong the inevitable." App. at 13. The

court ruled that the McKinneys "failed, even at oral argument, to make clear the nature of such an amendment" and that certain unspecified statements in their "appellate brief and. . . . at oral argument reveal that the McKinneys cannot adequately allege deliberate indifference." App. at 13. The court, however, never identified which of Petitioners' statements doomed their request for leave to amend.

Had the McKinneys "pleaded themselves out of court" in a way that would justify finding future pleading amendments futile – as when a plaintiff pleads facts demonstrating that a limitations period has elapsed – surely the Fifth Circuit would have said so. Having failed to do so, it is fair to conclude that nothing in Petitioners' complaint posed a logical or factual bar to his making additional allegations that might cure the deficiencies that the Fifth Circuit identified. That being the case, the "futility" conclusion follows logically *only* if one has concluded *as a matter of law* that state actors cannot be held liable where a private third party delivers the final blow to the plaintiff. Because if one allows for the legal possibility that Respondents could be liable if they even *increased* the danger that McKinney would be assaulted by a student, one cannot conclude that there are no facts existing in the world (including the specific ones McKinney mentioned in his appellate brief) that would have cured the pleading deficiencies identified here. The Fifth Circuit's decision to deny leave to amend is simply another manifestation of its reluctance to face head-on the question of whether the "state created danger" theory is viable. Having repeatedly announced its intention to proceed as if the theory were viable, the court cannot discount the allegations that Respondents played a part in

creating the danger on the bus, and it cannot conclude – as a matter of law or logic – that there are no additional facts that would bolster this contention.

This Court should take this opportunity to correct the Fifth Circuit's error, for if courts are permitted to find futility based upon their own factual conclusions about the cause of a plaintiffs' harm, Rule 15(a) loses its vitality. And as this Court has made abundantly clear, Rule 15(a)'s mandate – that leave to amend *shall* be freely given when justice so requires – "is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). If courts are permitted to find futility based upon their own conclusions, the futility exception will swallow the rule and render it meaningless.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 15, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10233

DAVID MCKINNEY; SYLVIA MCKINNEY,

Plaintiffs-Appellants,

versus

IRVING INDEPENDENT SCHOOL DISTRICT;
PATRICIA KIRKSEY, Individually;
SANDRA MAYES, Individually;
MADELEINE TEAL, Dr., Individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

October 18, 2002

Before STEWART and CLEMENT, Circuit Judges.*

CARL E. STEWART, Circuit Judge:

David and Sylvia McKinney (collectively, the "McKinneys") appeal from the district court's dismissal of their 42

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* Judge Henry A. Politz was a member of the panel that heard oral arguments. However, due to his death on May 25, 2002, he did not participate in this decision. This case is being decided by a quorum pursuant to 28 U.S.C. § 46(d) (1996).

U.S.C. § 1983 and state tort law claims. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

First we will summarize the facts alleged in the McKinneys' complaint, which for purposes of the motion to dismiss are accepted as true and construed in the light most favorable to the McKinneys. *See Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 928 (5th Cir. 2002).

David McKinney ("McKinney") was employed by the the [sic] Irving Independent School District ("IISD") as a special-education teacher at the Gilbert Transitional Center ("Gilbert"), a public school for students with severe behavioral problems, emotional disturbances, and learning disabilities. In December of 1996, McKinney agreed to also drive the bus that brought the special-education students to and from Gilbert.[1]

Students are referred to Gilbert from other schools in the IISD because Gilbert provides a more heavily structured and supervised environment. No student is assigned to Gilbert without going through a process known as Admission, Review and Dismissal ("ARD"), when placement at Gilbert may be formally recommended. Gilbert is the most restrictive placement option available for public school students in the IISD.

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[1] While acting as a bus driver, McKinney was employed by Dallas County Schools.

Due to the needs of the students at Gilbert, the school environment is heavily monitored and supervised; however, the IISD did not take similar care on the school bus. Shortly after McKinney began driving the bus, he began to document frequent and serious behavioral problems on his bus route, including students fighting, throwing objects at other motorists, and leaping from the emergency exit in the rear of the bus into traffic. On one occasion, McKinney called 911 for assistance because he was unable to operate the bus safely while also monitoring the students' conduct. Because of these behavioral problems, McKinney repeatedly requested that the IISD place a monitor on the bus to supervise the students and ensure his safety, the safety of the children, and the safety of other motorists.[2] McKinney's requests for the appointment of a monitor were directed specifically to Sandra Mayes ("Mayes") and Patricia Kelley ("Kelley") [sic]. Dr. Madeline Teal ("Teal") also had authority to appoint a bus monitor and was involved in the decisionmaking process. McKinney's requests were denied.

On November 17, 1997, McKinney was driving through rush-hour traffic when he was attacked by a student, who sprayed him in the eyes with a fire extinguisher. Although McKinney's vision and ability to drive were greatly impaired, he was able to safely maneuver the bus to a stop. As a result of the attack, McKinney has sustained significant injuries, including asthma and reactive airways disease that impair his ability to talk, his

[2] McKinney was informed during bus driver training that the IISD alone had the right to decide whether or not monitors should be assigned to buses.

physical endurance, and his stamina, and he has been unable to teach or drive a school bus.

On November 16, 1999, the McKinneys filed the instant suit against the IISD and three of its employees, Mayes, Kelley [sic], and Teal, (collectively, "defendants"). The complaint alleged that defendants acted under color of law to deprive McKinney of his due process rights under the Fourteenth Amendment by knowingly and affirmatively creating a dangerous environment, which they knew to be dangerous, that resulted in his foreseeable injuries and by failing to implement a policy to ensure his safety and thus acting with deliberate indifference to his safety. Specifically, the complaint contended that by concentrating and segregating the special education students with known behavioral problems into one school and one transportation population, and by adopting and adhering to a policy that did not require the assignment of any supervision to those students on the school bus, defendants "created the dangerous environment" that "was the actual and proximate cause of [McKinney's] injuries" and violated his rights "to liberty, bodily integrity, and a safe environment." Accordingly, McKinney maintained that defendants were liable under § 1983 based on a state-created danger theory. McKinney additionally asserted state law claims of negligence under the Texas Tort Claims Act and common law negligence. His wife, Sylvia McKinney, brought a claim for loss of consortium.

On December 22, 1999, defendants moved to dismiss the complaint for failure to state a claim. They argued that the state-created danger theory of recovery under § 1983 has not been adopted by this circuit, and that the state-law claims fail.

On January 23, 2001, the district court granted defendants' motion, refused the McKinneys' request for leave to amend their complaint, and entered final judgment in favor of defendants. The district court noted that this Court has not expressly adopted the state-created-danger theory as a basis for liability under § 1983, but nevertheless held that, even if McKinney could maintain a viable claim based on such a theory, the complaint did not allege facts sufficient to establish such a claim. Specifically, the district court determined that, although the pleadings described a dangerous environment, there were no allegations of facts showing that defendants' conduct increased the danger. The district court noted that it was the students' conduct that made McKinney's working environment dangerous and reasoned that while defendants may have failed to limit or reduce the danger, that was not the same as having increased it. The district court also concluded that the complaint did not allege facts sufficient to establish that defendants were deliberately indifferent because the student's attack on McKinney could have occurred regardless of whether a monitor was placed on the bus, and defendants did not affirmatively place McKinney in a position of danger, stripping McKinney of his ability to defend himself, or cut off McKinney's potential sources of private aid. The district court found compelling the fact that McKinney was voluntarily on the bus, and could have resigned in order to avoid the dangerous situation, meaning that no due process obligation on defendants' part was triggered. The district court further determined that the state law claims failed. The McKinneys now appeal.

DISCUSSION

I. Standard of Review

We review a district court's dismissal pursuant to Rule 12(b)(6) *de novo*. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 276 (5th Cir. 2001). Questions of fact are viewed in the light most favorable to the plaintiffs, and questions of law are reviewed *de novo*. *Id.* "A Rule 12(b)(6) motion should be granted only if it appears beyond a doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 348 (5th Cir. 2002).

We review the denial of leave to amend the complaint for abuse of discretion. *Lewis v. Fresne*, 252 F.3d 352, 356 (5th Cir. 2001).

II. 42 U.S.C. § 1983

The McKinneys argue that the district court erred in dismissing their § 1983 claim.[3] They contend that the district court erred in its determination that, even if the state-created danger theory were viable, the complaint did not contain sufficient allegations to support the theory. They also devote a large portion of their brief to the argument that this Court should recognize and explicitly adopt the state-created danger theory. We decline to do so. In light of the recent holding of our en banc court in

[3] The McKinneys make no argument regarding any of their state tort claims, and those claims are therefore waived. *See, e.g., Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (holding that arguments not briefed on appeal are deemed abandoned).

McClendon v. City of Columbia, __ F.3d __ (5th Cir. 2002) (en banc) ("*McClendon II*"), the McKinneys do not state a viable substantive due process claim under § 1983 regardless of the theory of liability, because they have failed to allege that IISD acted with deliberate indifference.

"To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995) ("*Piotrowski I*") (citation and internal quotations omitted). Municipal liability for § 1983 violations results if a deprivation of constitutional rights was inflicted pursuant to official custom or policy. *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001) ("*Piotrowski II*"), *cert. denied*, 122 S. Ct. 53 (2001).

The Due Process Clause of the Fourteenth Amendment does not, as a general matter, require the government to protect its citizens from the acts of private actors. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). The Supreme Court has clarified, however, that this general rule is not absolute: "It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198. This Court has recognized one such circumstance – when the "special relationship" between the individual and the state imposes upon the state a constitutional duty to protect that individual from known threats of harm by private actors. *See, e.g.*, *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995) (recognizing the "special relationship" exception and clarifying that it "only arises when a person is involuntarily confined or otherwise restrained against

his will pursuant to a governmental order or by the affirmative exercise of state power"). In addition to this "special relationship" exception, a number of our sister circuits have adopted a "state-created danger" exception to the general rule, under which a state actor who knowingly places a citizen in danger may be accountable for the foreseeable injuries that result. *See, e.g., Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) ("We have held the Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.").

At the time of the district court's decision, this Court had recognized but never adopted the state-created danger theory. *See Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200-01 (5th Cir. 1994). In *McClendon v. City of Columbia*, which was decided during the pendency of the present appeal, a panel of this Court "explicitly adopted and enforced this theory" and held that because McClendon demonstrated a genuine issue of material fact regarding each element of the state-created danger theory, his § 1983 claim against the defendant police officer for violation of his substantive due process rights should not have been dismissed on summary judgment. 258 F.3d 432, 436-38 (5th Cir. 2001) ("*McClendon I*"). In our recent rehearing of *McClendon I* en banc, however, we neither adopted nor rejected the state-created danger theory. The en banc court did make clear, however, that at the time of the events in *McClendon*, a state-created danger theory was not clearly established in this circuit such as would

sustain a § 1983 claim. Any statements to the contrary in *McClendon I* were expressly vacated. *McClendon II*, __ F.3d at __. Regarding McClendon's claim, we held that regardless of the theory of liability, the defendant police officer was entitled to summary judgment on grounds of qualified immunity because McClendon adduced no evidence suggesting the defendant police officer acted with deliberate indifference and, alternatively, because the law was not clearly established in this circuit. *Id.* As we explain further, regardless of the theory of liability employed, the McKinneys failed to allege deliberate indifference by IISD.

In order to recover under the state-created danger theory, we assume that a plaintiff would have to show, at a minimum, that: (1) the state actors created or increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference. *See Piotrowski I*, 51 F.3d at 515. The allegations in the McKinneys' complaint are insufficient to demonstrate that defendants acted with deliberate indifference. To establish deliberate indifference, the plaintiff must show that the state actors created a dangerous environment, that they knew it was dangerous, and that they "used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson*, 38 F.3d at 201. "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Id.* (citation and internal quotations omitted).

The district court determined that the McKinneys had not sufficiently alleged deliberate indifference because

they had not shown that defendants' failure to place a monitor on the bus created an opportunity for the attack to occur which would not have otherwise existed. The district court concluded that "the type of assault described in McKinney's pleadings could have occurred regardless of whether a monitor was placed on the bus." The district court further determined that there were no allegations that defendants forced McKinney to be on the bus or that they took actions to prevent him from protecting himself from the students, which also defeated the claim under the deliberate-indifference prong. The McKinneys contend that they made the required showing of deliberate indifference by alleging that the bus presented a dangerous situation, that McKinney informed defendants that there was a danger and requested relief, that defendants refused to assist him and remained willfully blind to the danger, and that defendants' conduct proximately caused his injury. We disagree.

In the instant case, there is no allegation that defendants "used their authority to create an opportunity that would not otherwise have existed" for the student to attack McKinney. *See Johnson*, 38 F.3d at 201. As the district court recognized, there is no doubt that the McKinneys described a dangerous working environment in their pleadings – that of uncontrolled and disruptive special-education students on a moving school bus in heavy traffic. They do not, however, allege any facts showing that defendants took any affirmative action to increase the risk over the dangers inherent in this working environment. The McKinneys concede that they do not allege or argue that the supervision of the students on the bus before McKinney became the bus driver was altered or changed when he agreed to drive the bus. As defendants

point out, McKinney drove the bus transporting these students for eleven months before the attack, during which time he allegedly reported numerous behavioral problems. The McKinneys do not allege that defendants' actions or inactions resulted in a more dangerous working environment on November 17, 1999 than would otherwise have existed for McKinney. This indicates that McKinney faced nothing more than the ordinary risks of driving the school bus that transported the special-education students to and from Gilbert. The McKinneys' real complaint is that defendants did not take an affirmative step, namely, provide a bus monitor to supervise the students or other safeguards for McKinney's protection while driving the bus. We hold that the due process clause did not require that defendants place a monitor on the school bus. *Cf. Wallace v. Adkins*, 115 F.3d 427, 430 (7th Cir. 1997) (holding that a prison guard failed to show that the prison officials affirmatively placed him in a position of danger that he would not otherwise have faced by assigning him to a prison unit with a prisoner that had previously threatened to kill the guard where the guard did not show that ordering him to stay on duty created dangers other than those a guard would have faced in the absence of such order). Thus, we conclude that the district court correctly found that the facts the McKinneys' allege do not state a substantive due process claim against defendants.

III. Leave to Amend

The McKinneys argue in the alternative that the district court abused its discretion in denying their request for leave to amend their complaint rather than dismiss it under Rule 12(b)(6). In their response to defendants'

motion to dismiss, the McKinneys concluded their argument by stating that "Plaintiffs would respectfully request that leave to amend this complaint be granted in the event that the Court concludes that pleading deficiencies exist."

Rule 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." FED. R. CIV. P. 15(a). Because a Rule 12(b)(6) motion to dismiss is not a "responsive pleading," the filing of such a motion does not extinguish a party's right to amend as a matter of course. *McClellan v. Miss. Power & Light Co.*, 526 F.2d 870, 872 n.2 (5th Cir. 1976), *vacated in part on other grounds*, 545 F.2d 919 (5th Cir. 1977).

The McKinneys had not previously amended their complaint. Therefore, they were entitled to amend their complaint at the time the district court granted defendants' motion to dismiss. "When, as in this case, a plaintiff who has a right to amend nevertheless petitions the court for leave to amend, the court should grant the petition." *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984). Nevertheless, we conclude that the district court did not abuse its discretion by denying the McKinneys' request.

The McKinneys filed a thirty-nine page response to the motion to dismiss in which they urged that they properly plead [sic] facts to state a § 1983 claim under a state-created danger theory. Moreover, they failed to amend their complaint as a matter of right, failed to furnish the district court with a proposed amended complaint, and failed to alert both the court and defendants to the substance of their proposed amendment. *See Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). While the McKinneys contend in their brief before this

Court that any alleged deficiencies in their pleading of deliberate indifference on the part of defendants could be cured by amendment, the McKinneys failed, even at oral argument, to make clear the nature of such an amendment. Their appellate brief and questioning at oral argument reveal that the McKinneys cannot adequately allege deliberate indifference and that "'remanding the case to allow another pleading would do nothing but prolong the inevitable.'" *Id.* (quoting *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986)). Thus, under these circumstances, we find no abuse of discretion in failing to grant leave to amend.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment dismissing the McKinneys' claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID McKINNEY and SYLVIA McKINNEY Plaintiffs, v. THE IRVING INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	§ § § § § § § § § §	Civil Action No. 3:99-CV-2601-L

ORDER

(Filed Jan. 24, 2001)

Before the court is Defendants' Motion to Dismiss for Failure to State a Claim, filed December 22, 1999. Upon careful consideration of the motion, response, reply, the pleadings on file in this case, and the applicable law, the court **grants** the motion for the reasons stated herein.

I. Factual and Procedural Background[1]

According to Plaintiffs' Original Complaint ("Complaint"), Plaintiff David McKinney ("McKinney") was

[1] On a Rule 12(b)(6) motion to dismiss, the court accepts the plaintiffs' factual allegations as true. *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993); *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2659 (2000).

employed by Defendant Irving Independent School District ("Irving ISD") as a special education teacher. McKinney taught at the Gilbert Transitional Center ("Gilbert"), a facility for students with severe behavioral and emotional problems and learning disabilities. In the course of his duties at Irving ISD, McKinney drove the bus that the special education students attending Gilbert rode back and forth to school.[2]

After assuming his bus driving duties, McKinney began to document frequent and serious behavioral problems on his bus route. The students on the bus fought with one another, threw objects at other motorists, and periodically leapt out the rear emergency doors of the bus while it was in traffic. On one occasion, McKinney called 911 for assistance because he was unable to operate the bus safely while also monitoring the students' conduct. Because of these behavioral problems, McKinney requested that Irving ISD place a monitor on the bus for purposes of supervising the student passengers. McKinney's requests for the appointment of a monitor were directed specifically to Irving ISD employees Sandra Mayes ("Mayes") and Patricia Kirksey ("Kirksey"). McKinney further alleges that Irving ISD employee Madeline Teal ("Teal") also had the authority to appoint a bus monitor and was involved in the decision-making process.

McKinney's requests for appointment of a bus monitor were refused by Irving ISD. On November 17, 1997, McKinney was driving the bus through rush hour traffic in Irving.

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[2] Plaintiffs state in their Complaint that while acting as bus driver, McKinney was employed by Dallas County Schools. Complaint at ¶ 8.

While driving the bus, McKinney was attacked by a student who sprayed him in the eyes with a fire extinguisher. McKinney's vision and ability to drive were greatly impaired, and although he was able to safely maneuver the bus to a stop, he sustained serious injuries including asthma and reactive airways disease that impair his ability to talk, physical endurance, and stamina. According to Plaintiffs, McKinney is no longer able to teach or drive a school bus.

Plaintiffs filed suit against Irving ISD, Mayes, Kirksey, and Teal on November 16, 1999. In Plaintiff's Complaint, McKinney asserts claims pursuant to 42 U.S.C. § 1983, and for negligence. Plaintiff Sylvia McKinney brings a claim for loss of consortium. Defendants filed their Motion to Dismiss for Failure to State a Claim on December 22, 1999. The court deferred action on the motion to dismiss, pending the Fifth Circuit's decision in *Piotrowski v. City of Houston*, 2001 WL 6712 (5th Cir. Jan. 17, 2001) (*Piotrowski II*), which addressed issues relevant to this case. Defendants' motion is now ripe for consideration by the court.

II. Standard of Review

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M University System*, 117 F.3d 242, 247 (5th Cir. 1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Blackburn v.*

City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaints as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In ruling on such a motion, the court cannot look beyond the face of the pleadings. *Id.*; *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2659 (2000). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff. *Lowrey*, 117 F.3d at 247. A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

III. Analysis

Defendants move to dismiss Plaintiffs' claims in their entirety pursuant to Fed. R. Civ. P. 12(b)(6), contending that Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Specifically, Defendants argue that McKinney's § 1983 claim depends on a legal theory that has not been adopted by the Fifth Circuit, that the Texas Tort Claims Act bars his negligence claim, and that the Texas Education Code bars Plaintiffs' suit against the individual Defendants Mayes, Kirksey, and Teal. Each argument will be addressed separately below.

A. 42 U.S.C. § 1983

McKinney alleges that Defendant violated his 14th Amendment rights to liberty, bodily integrity, and a safe environment because they deliberately and with callous

indifference created an environment known to be dangerous. This theory of liability is known as the "state-created danger" theory. Under this theory, "[w]hen state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'" *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir. 1994). There are two requirements that a plaintiff must demonstrate under this theory. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995) (*Piotrowski I*). "To establish deliberate indifference, '[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'" *Piotrowski II*, 2001 WL 6712, at *12 (quoting *Johnson*, 38 F.3d at 201); *see also Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997); *Piotrowski I*, 51 F.3d at 515 n.8. Failure to protect from injury, without more, is not sufficient for a violation of constitutional rights under this theory. "The Due Process Clause of the Fourteenth Amendment confers upon an individual the right to be free of state-occasioned damage to her bodily integrity, not the entitlement to governmental protection from injuries caused by non-state actors." *Randolph*, 130 F.3d at 730.

Although the Fifth Circuit has discussed the requirements of the state-created danger theory, it has not as yet adopted the theory as a basis for liability under § 1983.

Piotrowski II, 2001 WL 6712, at *11. The court need not decide whether to adopt this theory, however, because McKinney has failed to plead facts showing that he would be entitled to relief under this theory.[3] First, under this theory the danger must be *increased* by the state actors. McKinney has certainly described a dangerous environment in his pleadings – that of uncontrolled and disruptive students on a moving vehicle in heavy traffic. It was the conduct of the students on the bus, however, that made his working environment dangerous. Defendants' actions may have failed to limit or reduce the danger, but that is not the same as having increased it. Second, although McKinney has alleged deliberate indifference, he has not pleaded facts demonstrating that Defendants were deliberately indifferent, as defined by the Fifth Circuit, to his danger. Defendants' failure to place a disciplinary monitor on the bus did not "create an opportunity that would not otherwise have existed" for the attack on McKinney to occur. *Randolph*, 130 F.3d at 731. It is clear that the type of assault described in McKinney's pleadings could have occurred regardless of whether a monitor was placed on the bus. Moreover, Defendants' conduct does not constitute "'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.'" *Johnson*, 38 F.3d at 201 (quoting *Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987)). Defendants neither forced McKinney to drive

[3] The court believes it would be beneficial to decide the issue of whether the "state-created danger" theory is valid in this circuit. Given the Fifth Circuit's reticence to resolve the issue, the court declines the temptation to do so.

the bus nor took actions to *prevent* him or others from protecting himself against the students.

Finally, the court finds compelling that McKinney was voluntarily on the bus. He assumed other responsibilities in December 1996, and "agreed to drive the bus for the special education students enrolled at Gilbert Transitional Center."[4] In *Randolph*, the Fifth Circuit held that the plaintiff would not be able to recover even if the state-created danger theory was adopted by the court. *Randolph*, 130 F.3d at 731. There, the plaintiff was a mental patient who voluntarily resided in a government-subsidized apartment complex for outpatients of Mississippi's state mental health center. While living at the complex, the plaintiff injured herself and brought suit under § 1983, alleging in part that the conditions at the apartment complex presented a state-created danger because the defendants did not prevent the plaintiff from injuring herself. *Id.* at 729. The Fifth Circuit held that because the plaintiff's residence at the complex was voluntary, and she was free to come and go from the premises and to terminate her lease at any time, no duty was triggered under the state-created danger theory. *Id.* at 731.

In the instant case, McKinney was free to leave his employment with Irving ISD at any time, and was not involuntarily driving the bus at Defendants' behest. That Defendants apparently allowed the dangerous situation on the bus to continue and did not appoint a monitor despite McKinney's complaints does not alter the analysis. Even

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[4] Plaintiff's Complaint ¶ 8.

though Defendants allowed McKinney to place himself in peril when he drove the bus, they did not leave him without any defense to the situation. His actions were voluntary and he simply could have resigned in order to avoid the dangerous situation. Although it may seem harsh to make an individual choose between two seemingly unpalatable options – give up his job or work in a dangerous environment – the alternative would amount to a governmental obligation to safeguard its employees. The Supreme Court has definitively ruled that due process includes no such obligation. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 127 (1992) (due process does not obligate a governmental employer "to provide its employees with minimal levels of safety and security in the workplace"); *see also White v. Lemacks*, 183 F.3d 1253, 1257-58 (11th Cir. 1999) (noting that prior Eleventh Circuit precedent establishing that "a government employment relationship, in and of itself, is a 'special relationship' giving rise to a constitutional duty to protect individuals from harm by third parties" had been overruled by *Collins*).[5] *Collins* involved a sewer worker who died of asphyxia while working in a sewer line; the complaint alleged that the city had notice of the risks associated with the work, but did not provide safety equipment and training required by state statute. *Collins*, 503 U.S. at 117. The government's "continuing [due process] obligation to satisfy certain minimal custodial standards" for individuals involuntarily restrained is not implicated "when it

[5] The precedent that had been effectively overruled by *Collins*, as recognized by *White*, was *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)

made, and [the deceased] voluntarily accepted, an offer of employment." *Id.* at 127-28.

The facts in this case are analogous to those in *Randolph* and *Collins*. McKinney's § 1983 claim therefore fails because, even if the court were to adopt the state-created danger theory, he has not pleaded adequate facts establishing a claim of entitlement to relief. Accordingly, this claim must be dismissed.

B. Negligence

In his second cause of action, McKinney alleges that his injuries were caused by Defendants' negligence. McKinney has asserted negligence claims against both Irving ISD and the individual Defendants. For different reasons, Defendants argue that these claims should be dismissed.

1. Negligence Claim Against Irving ISD

Defendants argue that his negligence claim against Irving ISD should be dismissed because it is barred by the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.001, *et seq.* (West 1997 & Supp. 2001) ("TTCA"). The TTCA provides for a limited waiver of governmental immunity in personal injury cases arising from the operation or use of a motor vehicle. *Id.* § 101.021; *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992); *United Indep. Sch. Dist. v. Gonzalez*, 911 S.W.2d 118, 125 n.5 (Tex. App. – San Antonio 1995, writ denied). The statute further provides that school districts are not liable for negligent acts that do not fall within the

purview of this exception. Tex. Civ. Prac. & Rem. Code Ann. § 101.051 (West 1997).

McKinney maintains that because he was injured on a school bus, Irving ISD has waived its immunity in this case. More specifically, he maintains that the bus was being operated in an unsafe manner due to his distraction with the unruly student riders and thus his injuries arose from the operation of the bus. The court disagrees. Even when the court views the allegations pleaded by McKinney in the light most favorable to him, and assumes that the bus was not safely operated, it was not the operation of the bus, meaning the actual vehicle, that caused his injury. The student who attacked him was the cause of the injury. When an injury occurs on a school bus but does not arise out of the use or operation of the bus, and the bus is only the setting for the injury, immunity for liability is not waived. *LeLeaux*, 835 S.W.2d at 52; *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987); *see also Estate of Garza v. McAllen Indep. Sch. Dist.*, 613 S.W.2d 526, 528 (Tex. App. – Beaumont 1981, writ ref'd n.r.e.) (students were stabbed to death on school bus; "the injury arose out of the failure to control and supervise the public, and not from the operation or use of a motor vehicle" and thus the TTCA waiver provision did not apply). In this case, as in *Estate of Garza*, Plaintiffs plead facts that demonstrate that the injury came about because the bus occupants were not adequately controlled rather than because the bus was *operated* in an unsafe manner. The fact that the bus was an unsafe environment itself is insufficient if the operation of the bus did not create the dangerous condition. The only allegation by Plaintiffs of a causal connection is that McKinney's attention was focused on driving rather than on his personal safety. That

simply is not enough to find that the operation of the bus was a proximate cause of the injury. McKinney's negligence claim against Irving ISD therefore is barred by the TTCA.

2. Negligence Claims Against Mayes, Kirksey and Teal

McKinney has sued Mayes, Kirksey, and Teal in their individual capacities, claiming that they were negligent in failing to place a monitor on the bus. Defendants move to dismiss these claims, arguing that Mayes, Kirksey, and Teal are shielded from liability under Tex. Educ. Code Ann. § 22.051 (West 1996), which states:

> (a) [a] professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.
>
> (b) This section does not apply to the operation, use, or maintenance of any motor vehicle.

Defendants argue that because the actions of the individual Defendants involved judgment and discretion, and were not related to the use of force in disciplining a student, the exception presented in § 22.051(a) does not apply, and thus they cannot be personally liable for negligence. Plaintiffs do not dispute, and apparently concede, that the

individual Defendants meet the criteria set forth in § 22.051(a).[6] Instead, McKinney relies on § 22.051(b) to argue that because his injuries arose out of the operation of a motor vehicle, the immunity afforded by subsection (a) is not available to the individual Defendants. The court disagrees. As previously stated herein, the court holds as a matter of law that, based on the allegations in the complaint, McKinney's injuries did not arise out of the operation of the bus. Section 22.051(b) therefore does *not* apply. Section 22.051(a), however, *does* apply, and McKinney cannot prevail on his negligence claims against Mayes, Kirksey, and Teal. These claims must be dismissed.

C. Loss of Consortium

Finally, Mrs. McKinney sues for loss of consortium resulting from McKinney's injuries. Loss of consortium claims are derivative. *Motor Express, Inc. v. Rodriguez*, 925 S.W.2d 638, 640 (Tex. 1996). Where liability has not been established on the primary claim, loss of consortium claims fail as a matter of law. *Id.* Mrs. McKinney's loss of consortium claim fails because the court has determined that Defendants are not liable to McKinney on any of his

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[6] That Defendants Mayes, Kirksey, and Teal are professional employees of Irving ISD is not in question. According to Plaintiffs, Mayes is the director of the Special Education Department; Teal is a supervisor in the Special Education Department; and Kirksey is the Special Education Coordinator. *See* Plaintiff's Complaint ¶ 43. Likewise, that these individuals acted incident to or within the scope of their employment and that their duties and responsibilities necessarily involved the exercise of judgment and discretion cannot seriously be challenged. Indeed, the core of Plaintiff's state law claims is that the judgment or discretion exercised by these individuals was not what it should have been towards McKinney. *See id.* at 15-20

claims. As a derivative claim, Mrs. McKinney's loss of consortium claim therefore fails as well. The loss of consortium claim must be dismissed.

IV. Conclusion

Plaintiffs ask the court to grant them leave to amend their pleadings in the event that Defendant's motion is ranted. The decision to allow amendment of the pleadings is within "the sound discretion of the district court." *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994). In determining whether to allow an amendment of the pleadings, the court considers the following: undue delay in proceedings, undue prejudice to the opposing parties, timeliness of the amendment, and futility of the amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1163 (5th Cir. 1982). Based on key facts already pleaded, the court has held that both Irving ISD and the individual Defendants are immune from liability for any negligence and there was no violation of McKinney's constitutional rights. The court concludes that Plaintiffs can plead no additional facts which would entitle them to relief under the "state-created danger" theory regarding the constitutional claim or under a theory of negligence regarding the state law claims. The court therefore finds that permitting Plaintiffs to replead their case would be an inefficient use of the parties' and the court's resources, would cause unnecessary and undue delay, and would be futile. For the reasons stated herein, Defendants' Motion to Dismiss for Failure to State a Claim is **granted**, and Plaintiff's claims are dismissed with prejudice. Judgment will be entered by separate document.

It is so ordered this 23rd day of January, 2001.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID McKINNEY and SYLVIA McKINNEY,	§	
Plaintiffs,	§	Civil Action No.
v.	§	3:99-CV-2001-L
THE IRVING INDEPENDENT SCHOOL DISTRICT, et al.,	§	
Defendants.	§	

JUDGMENT

(Filed Jan. 24, 2001)

This judgment is entered pursuant to the court's Memorandum Opinion and Order of January 23, 2001. It is therefore ORDERED, ADJUDGED, and DECREED that Plaintiffs take nothing, that all relief requested by Plaintiffs is denied, and that this action is hereby dismissed with prejudice. All allowable costs are taxed against Plaintiffs.

Signed this 23rd day of January, 2001.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

David McKinney and Sylvia McKinney	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. 3-99CV2601-L
The Irving Independent School District, Patricia Kirksey, individually, Sandra Mayes, individually, and Dr. Madeleine Teal, individually	§	JURY DEMAND
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

(Filed Nov. 16, 1999)

COME NOW, PLAINTIFFS DAVID MCKINNEY and SYLVIA MCKINNEY, individually, in the above-styled and numbered cause of action, and file this their Original Complaint, complaining of the conduct of Defendants IRVING INDEPENDENT SCHOOL DISTRICT, SANDRA MAYES, PATRICIA KIRKSEY, and DR. MADELEINE TEAL and would respectfully show the Court the following:

A. PARTIES

1. Plaintiffs David McKinney and Sylvia McKinney are individuals who reside in Johnson County, Texas.

2. Defendant, Irving Independent School District ("District"), is a school district and local governmental entity, a body corporate that may be sued. Texas

Education Code § 11.151. Process may be served on the superintendent of the Irving Independent School District, Mr. Jack E. Singley, at 901 N. O'Connor Road, Irving, 75061-4596, Dallas County, Texas. Texas Civil Practice and Remedies Code § 17.024(c).

3. Plaintiffs Sandra Mayes, Patricia Kirksey and Dr. Madeleine Teal are individual employees of the Irving Independent School District and can be served with process by personal delivery at their place of employment, at Irving Independent School District, Special Education Department, 1600 E. Shady Grove Road, Irving, Texas 75060-6313. Pursuant to Texas state law, Plaintiffs Mayes, Kirksey, and Teal may also be served by registered or certified mail. Tex. Rule Civ. Pro. 106.

B. JURISDICTION

4. Plaintiffs, as the persons aggrieved by the conduct of Defendants, have standing to bring this suit, and as individuals, have capacity to sue under the laws of the State of Texas. Individual defendants Mayes, Kirksey and Teal are individuals, and are subject to suit under the laws of the state of Texas. Defendant Irving Independent School District is subject to suit, and service is effected upon the superintendent of the district. Texas Education Code § 11.151; Texas Civil Practice & Remedies Code § 17.024(c).

5. The Court has personal jurisdiction over all Defendants because Defendants are either Texas residents or governmental entities created under the laws of the State of Texas.

6. This Court has subject matter jurisdiction over the Defendants because each Defendant is being sued under the provisions of 42 U.S.C. § 1983. Specifically, Plaintiffs allege that Defendants, acting under color of

state law, deprived Plaintiff David McKinney of his Constitutional right to liberty and bodily integrity, a claim that is actionable under the 42 U.S.C. § 1983. Therefore, this case presents a federal question for determination by this Court pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over Plaintiffs' state law claims, which are based on Texas's common law negligence doctrine and on the Texas Tort Claims Act, but which arise out of the same case or controversy as Plaintiffs' § 1983 action, under its pendent-claim jurisdiction. 28 U.S.C. § 1367(a).

C. VENUE

7. Venue is proper in this Court because all Defendants reside in the Northern District of Texas, and all of the acts and omissions complained of took place in the Northern District of Texas.

D. FACTS

8. Plaintiff David McKinney was employed by the Irving Independent School district as a special education teacher at the Gilbert Transitional Center, a career he began in August, 1996. In December, 1996, Mr. McKinney assumed extra responsibilities, and agreed to drive the bus for the special education students enrolled at the Gilbert Transitional Center. Mr. McKinney was employed by Dallas County Schools while acting as bus driver.

9. The Gilbert Transitional Center ("Gilbert") is the public school within the Irving Independent School District which handles the children with the most severe behavioral problems, emotional disturbances, and learning difficulties. Students are assigned to Gilbert only after having demonstrated an inability to learn successfully at their home campus. Upon information

and belief, students are referred to Gilbert from the other schools in the district because they have behavioral, emotional or learning problems which are best handled in a more heavily structured and supervised environment. No student is assigned to Gilbert without having first gone through a process known as "Admission, Review and Dismissal" (ARD), when placement at Gilbert may be formally recommended. Students do not have the right to remain at their home campus or to return there at will; rather, they must demonstrate certain kinds of improvement in behavior or learning before being returned to their home campus. Students at Gilbert range in age from early elementary school through age 22. Because the students enrolled at the school have already been identified as having a need for structure and supervision, Gilbert is, upon information and belief, the most restrictive placement option available for public school students in the Irving Independent School District.

10. Although the school environment is heavily monitored and supervised due to the demonstrated needs of the students, McKinney soon learned that the district did not take similar care in the school bus environment. Soon after assuming his bus driving duties, McKinney began to document behavioral problems on his route. These problems were frequent and serious. Students, who ranged in age from early elementary school age to age 22, fought with one another on the bus, threw objects at other motorists, and periodically leapt out the emergency doors in the back of the bus while it was in traffic. On one occasion, McKinney was forced to call 9-1-1 for assistance because he was unable to drive the bus safely and monitor the children at the same time.

11. In light of the identified behavioral problems which threatened his ability to drive the bus safely and threatened the safety of the children, Mr. McKinney

repeatedly requested that the District appoint a permanent monitor to ensure his safety, the safety of the children, and the safety of other motorists, who could be injured in the event that a bus driver distracted by unruly passengers was unable to operate the bus safely. During the bus driver training provided to him by the District, McKinney had been informed that the District alone had the right to make decisions as to whether or not monitors should be assigned to buses for the purpose of supervising children and ensuring the safe transportation of both children and bus driver.

12. McKinney, therefore, made repeated requests to the District, asking that such a monitor be appointed. These requests were denied. These requests were directed specifically to Defendants Mayes and Kirksey, the persons to whom McKinney understood that the District had delegated authority to approve the appointment of monitors on buses transporting special needs or special education students. Upon information and belief, Defendant Teal also had authority to appoint a monitor and was involved in the decision-making process.

13. Despite the reasonableness of his requests, and his documented record of violent, unruly and unsafe behavior on the bus, behavior which threatened all of the bus occupants, McKinney's reasonable requests were denied by the Defendants.

14. On November 17, 1997, months after he had begun requesting that a monitor be appointed, McKinney was attacked and seriously injured while driving the bus through rush hour traffic. McKinney had arrived at the intersection of Beltline Road and Rochelle Road in Irving at approximately 7:30 a.m. Because driving the bus through a rush-hour intersection demanded all of his attention, McKinney was unable to simultaneously

monitor his student passengers at that moment. And at that moment, while his attention was necessarily fully fixed on the safe operation of the vehicle, McKinney was attacked by a student, who sprayed him in the eyes with a fire extinguisher, greatly inhibiting his ability to see, to drive, or to function. Although McKinney was able to complete his passage through the intersection and bring the bus to a stop without injuring other motorists, he sustained serious injuries.

15. As a result of the foreseeable attack by the student, McKinney has suffered significant personal injuries, including but not limited to serious asthma and reactive airways disease, which conditions greatly impair his ability to talk and which greatly impair his physical endurance and stamina. Due to the damage to his health, McKinney has been unable to continue his teaching career, nor has he been physically able to resume his bus driving duties.

E. CAUSES OF ACTION

COUNT I – VIOLATION OF 42 U.S.C. § 1983

16. Defendants, individually and jointly, as actors for the State of Texas, have deprived McKinney of his right to liberty, to bodily integrity, and to a safe environment, which are clearly established rights guaranteed by the 14th Amendment to the Constitution of the United States. Defendants did so when they knowingly, and with deliberate and calloused indifference, created an environment they knew to be dangerous. This environment was dangerous due to actions taken by the District and its policymakers or their delegates, actions that were the result of affirmative policies adopted by the District through its policymakers and/or their delegates, and/or actions that were the result of a widespread practice, custom and usage within the district.

17. The bus driven by McKinney was scheduled to operate during peak traffic periods within the Dallas-Fort Worth metropolitan area. It was well known to the Defendants that the operation of such a vehicle under those conditions required the full attention of bus drivers like McKinney; failure to devote his full attention to the safe operation of the bus would have jeopardized the safety of the students and of other motorists on the road.

18. The Defendants also knew that the bus driven by McKinney was always loaded with special needs students who were known to have disciplinary problems and to be prone to commit acts of violence and the destruction of property. That his busload of students were all special needs students was a function of affirmative policy implemented by the District. Defendants were well aware of the disciplinary needs of these students.

19. Defendants had actual, full and complete knowledge of the high level of care required to operate a bus under normal conditions, given the over-sized nature of the vehicle and the number of persons entrusted to the driver's care. Defendants knew that bus drivers like McKinney would be unable to monitor the students in any meaningful way while operating the bus. Defendants also knew that while operating the bus, no driver could supervise or monitor the actions of ordinary students, much less the actions of the special education students in question, students with a known and demonstrated propensity toward behavioral problems.

20. Defendants also had full and complete knowledge of the disciplinary records of the students loaded onto McKinney's bus, as well as the students' lack of appreciation for the consequences of their actions. Defendants also knew that the students' disciplinary

problems were creating safety problems on the bus. Not only did McKinney himself actually communicate those problems to Defendants, but he and all other bus drivers are required to fill out and submit written reports documenting those problems as they occurred. Defendants knew that McKinney had experienced, and would continue to experience, behavioral problems creating safety hazards on the school bus, and they knew that McKinney would be unable to monitor the students in any meaningful way while operating the bus. Defendants knew that while driving the bus, McKinney would be unable to control or prevent the potentially violent or unruly acts of the students while simultaneously ensuring that the bus was operated in a safe and prudent fashion. Defendants knew that while operating the unmonitored bus, McKinney would be unprotected against bodily injury from violent or unruly acts of the students, and that any attack or assault could result in serious bodily injury to McKinney. Defendants also knew that other students were at similar risk of harm.

21. A school bus, when operated in heavy traffic and loaded with completely unsupervised special needs students with known severe disciplinary problems, ranging up to 22 years in age, is a dangerous environment, one created by Defendants. Defendants created the environment by concentrating and segregating the special needs students into one school and one transportation population, and by adopting and adhering to a policy that did not require the assignment of any supervision to those students. Defendants knew that the environment they created was unsafe, and that should trouble arise – as it did on November 17, 1997 – bus drivers and other student passengers would be completely cut off from outside assistance. Having created the dangerous environment by refusing to appoint a monitor to supervise a

group of students with known behavioral problems, it was plainly foreseeable to the Defendants that McKinney would be injured by the violent or unruly acts of the unmonitored students.

22. The District required McKinney to submit to its direction and control in order for him to perform his bus driving duties. Defendants determined the route and schedule for the operation of the bus, and also determined which students would be placed on the bus. Defendants determined the mix of students on the bus, and the age range of students on the bus. The operation of the bus was a specifically planned activity under the direct control and supervision of Defendants. Additionally, Defendants retained the exclusive right to authorize the appointment of the monitor on the bus, and instructed school bus drivers like McKinney of that right in bus driver training courses and through other means.

23. The District was duly authorized by the State to establish the policies and procedures regarding when monitors would be provided on buses such as the one operated by McKinney, and, upon information and belief, the District delegated that authority to Defendants Mayes, Teal and Kirksey. McKinney himself had no authority to control the conditions under which the bus would operate.

24. It is the custom, policy and practice of the District to provide transportation to its students as part of its operation of the school district. It is the custom, policy and practice of the District to concentrate and segregate those students with the most serious behavioral problems into one student population, and one transportation population. It was the custom, policy and practice of the District to group students of widely-varying ages and behavioral disorders into one group for purposes of transporting them to and from school.

It was the custom and policy of the Defendants to provide that transportation in the first instance without supervision. This policy extended to students like those at Gilbert, students with known and demonstrated behavior problems. The Defendants adhered to this policy and custom even though they had actual knowledge of the dangers and inherent risks created thereby for the driver of the bus, other students on the bus, and other motorists on the road. It was further the custom, policy and procedure of the District to retain the sole authority to determine when supervision, in the form of a bus monitor, would be approved, and to deny requests for appointment of permanent monitors.

25. Defendants had control over the school bus environment, specifically the safety measures to be taken on the bus. Defendants alone were responsible for the dangerous environment in which McKinney was placed, one in which students with known behavioral problems are left unsupervised and the bus driver is left vulnerable to attack due to the need to devote full attention to the safe operation of the bus in heavy traffic. Adoption of this policy and custom demonstrates a deliberate and calloused indifference to the dangers in which they were placing the students on the bus, the bus driver, and the other motorists on the road. Defendants' policy and custom, which created the dangerous environment, was tantamount to a policy requiring that all buses be equipped with bald tires and faulty brakes – it created a known danger that was certain to cause injury to the bus driver, the student passengers, or to surviving motorists.

26. Defendants Mayes, Teal, and Kirksey were, upon information and belief, the persons delegated the authority to make policy concerning the transportation of special needs students like those attending Gilbert and/or to implement District custom and usage relating

to those transportation issues. Mayes, Teal, and Kirksey were the persons who determined the budget for the transportation of those students, who determined how bus routes were to be established for the special education population at Gilbert, who determined the mix of students on those buses, and who determined the circumstances in which temporary or permanent monitors were to be appointed to the school buses. Upon information and belief, Mayes, Teal, and Kirksey adopted and implemented a policy in which special needs students with known behavioral problems like those at the Gilbert Transitional Center were concentrated and segregated from other students, and they adopted and implemented the policy to leave these special needs students on the bus without supervision. Mayes, Teal, Kirksey were personally involved in both the formation of this policy, custom or procedure and were personally involved in the implementation of that policy, custom or procedure. Specifically, upon information and belief, Mayes, Teal and Kirksey were all personally involved in the multiple decisions denying McKinney's repeated requests that a monitor be permanently assigned to his bus.

27. McKinney requested that Defendants place a monitor on the bus, and Defendants refused to do so. Those requests were reviewed by Defendants Mayes, Teal, and Kirksey, the persons McKinney believed possessed the authority to make the decision to appoint the monitor. Denial of those repeated requests was, upon information and belief, the result of a policy adopted by the District. Alternatively, the denial of those requests was a widespread practice constituting the custom and usage of the district, which customs and uses have the force of law.

28. Defendants, as custodians and supervisors of McKinney's bus, were constitutionally required to protect McKinney from inherent, foreseeable dangers of an

attack or assault from special education students who were known to have severe disciplinary problems. Defendants' repeated refusal of McKinney's requests for a monitor created a dangerous environment, one for which Defendants were solely responsible. Defendants caused McKinney to encounter this known dangerous environment. Defendants' refusal to appoint a monitor to supervise the students in the face of known dangers which had been repeatedly brought to their attention, known dangers which Defendants had created, was an act of deliberate and calloused indifference to McKinney's safety and the safety of both student passengers and other motorists.

29. Adoption and implementation of the custom, policy and procedure which left students with known behavioral problems on unsupervised school buses for up to three hours per day was the actual and proximate cause of the injuries sustained by McKinney when he was assaulted while driving the bus on November 17, 1997. Had the Defendants assigned a monitor to his bus as he requested, McKinney could have been protected by that monitor during those vulnerable moments when he was fully involved in the safe operation of the bus. Additionally, the monitor could have warned McKinney of the need to pull the bus over to protect himself. Defendants' creation of the dangerous environment left McKinney vulnerable and defenseless, and was the cause of his foreseeable injury.

30. The custom, policy and procedure of Defendants regarding the placement of monitors on buses created an extremely hazardous situation, one well known to the Defendants, given their actual knowledge about the student population and the hazards involved in driving those students. This longstanding policy or custom of Defendants, especially in view of McKinney's express requests for a monitor, was Defendants'

intentional choice, and its enforcement was the moving force behind the violation of McKinney's constitutionally protected rights. Defendants were deliberately indifferent to the foreseeable risks faced by McKinney in his operation of the unmonitored bus. Defendants created and caused McKinney to encounter a dangerous, uncommon circumstance, which in turn created a duty upon the Defendants to protect McKinney's substantive due process rights. Defendants' deliberate indifference to these rights of McKinney amounted to a willful disregard of the potential harm to McKinney, and a breach of the Defendants' constitutional duty owed to McKinney, and resulted in the plainly obvious consequence of serious bodily injury to McKinney.

31. The conduct of Mayes, Teal, and Kirksey, who repeatedly denied McKinney's requests for a monitor although they knew that the students on his bus were dangerous and difficult to control, was conduct which demonstrated a reckless and calloused indifference to McKinney's clearly established federal liberty interest in bodily integrity, one for which exemplary damages may be imposed.

* * *

G. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that each Defendant be cited to appear and answer this complaint, and that, upon final hearing, Plaintiffs recover the following relief from Defendants jointly and severally:

a. Damages as pleaded;

b. Costs of court;

c. Prejudgment interest at the highest lawful rate and to the maximum extent allowed by law;

d. Interest on the judgment at the highest legal rate from the date of judgment until collected;

e. All such other and further relief at law and in equity to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

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JURY DEMAND

Plaintiffs demand that all issues in this case be tried to a properly empanelled jury.

NO. 01-10233

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID McKINNEY AND SYLVIA McKINNEY
Plaintiff-Appellant,

VS.

THE IRVING INDEPENDENT SCHOOL DISTRICT
Defendants

On Appeal From The United States District Court
For The Northern District of Texas
United States District Court No. 3-99-CV-2601-L

SECOND REVISED BRIEF OF APPELLANT DAVID McKINNEY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have or may have an interest in the outcome of this case. These representatives are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

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Defendants moved to dismiss the case on the sole ground that the "state created danger" theory of §1983 liability is not viable in this Circuit. The trial court, however, dismissed the case because it concluded that the McKinneys failed to plead the state created danger claim sufficiently, and that the deficiencies were such that any amendment would be futile. The trial court dismissed the case on January 23, 2001, and entered final judgment on that date. The McKinneys filed their Notice of Appeal on February 16, 2001.

III. STATEMENT OF FACTS

Appellant David McKinney is a certified special education teacher and former police officer. From August, 1996 through the end of 1997, he was employed by Defendant, Irving Independent School District ["IISD"] as a special education teacher at the "Gilbert Transitional Center," the campus within the IISD where the District concentrates and sequesters all students with such severe behavioral, emotional, and mental problems they cannot be educated on a mainstream campus without posing a danger to themselves or others.[1] The IISD segregates these students at Gilbert so they can provide the stringent supervision, discipline and structure these students require.[2] For most of the students, Gilbert is the least restrictive environment available to them, short of juvenile detention.[3]

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[1] R. at 4, 7-12, 14 (Original Complaint at 4, 7-12, 14).

[2] R. at 4-5, 8-12, 14 (Original Complaint at 4-5, 8-12, 14).

[3] R. at 5 (Original Complaint at 5).

McKinney soon earned a reputation as a "clearly outstanding" teacher who exceeded expectations, one who had demonstrated success with these troubled students. This success, together with McKinney's background as a police officer, caused the District to recruit him to drive the Gilbert school bus as well as teach, and he eventually agreed.[4]

The population of students that rode McKinney's bus were those he taught as a special education teacher – the students at Gilbert. Each student on his bus had been transferred to Gilbert as a matter of policy, the district – having determined through a formal process known as an "Admission, Review, and Dismissal" process, or "ARD"[5] that the student was too disruptive or dangerous to educate in mainstream classrooms.[6] Every student at Gilbert – and on McKinney's bus – had a documented history of serious disciplinary problems, violent behavior, or emotional or mental problems.[7] The ages of those students ranged from five to 22 years.[8]

Due to the nature of the student population, security at Gilbert was high. Every classroom at Gilbert was staffed with both a teacher and a teacher's aide; an Irving police officer was assigned to the school on a permanent basis. The Gilbert bus drivers were instructed that the

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[4] R. at 5-6 (Original Complaint at 5-6). The school bus was operated by another governmental entity, Dallas County Schools, not a party to this case.

[5] R. at 4 (Original Complaint at 4).

[6] R. at 4, 7-12, 14 (Original Complaint at 4, 7-12, 14).

[7] R. at 4-5 (Original Complaint at 4-5).

[8] R. at 4 (Original Complaint at 4).

school bus was to be considered an extension of the classroom in all respects, including safety and supervision.

McKinney soon discovered that this policy was in no way implemented on the school bus. Despite the known violent and unstable nature of the population of students they had segregated and concentrated at Gilbert, the District failed to provide any of the strict supervision or discipline on the bus that they insisted upon in the classroom.[9] No security aide or monitor was assigned to the bus,[10] nor did the District authorize the issuance of a video camera, radio, or cell phone for emergencies.

Not only did the District fail to address the safety problem they created on the bus when they concentrated this group of troubled students together, they increased that danger by enforcing a strict prohibition against any unauthorized person accompanying the driver, thereby forestalling any attempt Mr. McKinney might have made to provide his own security.[11] The obvious safety problem was also exacerbated because the mix of students, intentionally excluding as it did "well-behaved" and non-disruptive students, excluded additional people who could have warned McKinney of any problems, provided physical

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[9] R. at 5-6 (Original Complaint at 5-6).

[10] R. at 5-6 (Original Complaint at 5-6).

[11] Under this policy, McKinney was prevented from enlisting the help of friends, relatives, or fellow teachers, who could have helped "watch his back." Other drivers had been severely disciplined for violating this policy. To the extent that this fact is not a reasonable inference to be drawn from other facts pled in the Complaint, facts attesting to the District's total control over the bus environment [see, e.g. R. at 5-6, 8-12, 14, 15-17], it is the sort of fact that McKinney should be permitted to expressly allege in a pleading amendment.

assistance, or simply mediated bad behavior through the exercise of peer pressure. The District knew that McKinney was helpless to defend himself or intervene in aggressive behaviors when his attention was necessarily focused on driving the heavy bus through rush hour traffic.[12] When the District Defendants systematically refused to provide any other oversight to reduce the danger to McKinney, they sent students the message that the bus was a discipline-free zone. The students received the message and acted accordingly – for up to one and one-half hours, twice a day.[13]

Not surprisingly, problems on the bus were a daily occurrence. These included fighting, yelling obscenities at other motorists, throwing objects at other motorists and each other, and even leaping out of the emergency door into traffic. On one occasion, the fighting was so bad, McKinney pulled the bus over and called 911 on his own cell phone to get police assistance to control the riotous students.[14] Each of these behaviors constitutes a "Disruption of Transportation," which would have been a Class C misdemeanor under the Texas Education Code, had it been enforced by the District.[15]

McKinney routinely submitted "Notice of Unsatisfactory Conduct on School Bus" forms to the District and to

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[12] R. at 5, 9-10 (Original Complaint at 5, 9-10).

[13] R. at 4-5, 8-12, 14 (Original Complaint at 4-5, 8-12, 14).

[14] R. at 5 (Original Complaint at 5).

[15] Tex. Educ. Code, Section 37.126, "Disruption of Transportation." Perversely, the District Defendants asked the police officer assigned to Gilbert to *refrain* from writing so many tickets for such violations.

the Individual Defendants, alerting them to the problems on the bus.[16] Weekly staff meetings were held at Gilbert, and the bus problems were always a matter of discussion. McKinney described his problems in frequent e-mails to the Individual Defendants, particularly Mayes and Kirksey. He telephoned as well, but his requests were rebuffed.[17] Weekly reports were made to the Individual Defendants by the principal and the school psychologist. The Gilbert principal consistently recommended that the District place monitors on the bus, and that it contract with individual parents to provide transportation for the most disruptive students. And he had done so ***for many years***.

The dangerous condition on the bus, having been created through the exercise of official authority, could also have been remedied through the use of that authority. Remedy was available in three forms, all depending on the Defendants. One remedy was to assign a monitor to the bus to oversee the behavior, a remedy McKinney repeatedly requested, without avail.[18] The District Defendants had the exclusive authority to authorize the appointment of a safety monitor to the bus.[19] Another remedy would have been to revoke the bus-riding privileges of troublemakers, and contract with their parents to provide transportation to and from school, or to restrain those students while on the bus. Again, the District Defendants alone had the authority to implement this remedy. This remedy was

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[16] R. at 5-6, 13-15 (Original Complaint at 5-6, 13-15).

[17] R. at 9, 13 (Original Complaint at 9, 13).

[18] R. at 5-6, 10-15 (Original Complaint at 5-6, 10-15).

[19] R. at 5, 11 (Original Complaint at 5, 11).

also requested, and this request, too, was denied. Finally, the Defendants could have amended their policy to permit drivers to enlist the volunteer assistance of a fellow teacher, friend or relative for protection instead of subjecting anyone who took such an action to severe disciplinary action. Again, the District which alone had the power to do so, never approved this remedy.

Instead, the District Defendants turned a blind eye to McKinney, and to the danger they had created, leaving him alone on that bus for three hours a day to fend for himself. Indeed, they *thwarted* attempts others made to reduce the danger. After the 911 incident, for example, Dallas County Schools, the governmental entity providing the bus services, assigned a monitor to McKinney's bus, though it had no authority to do so. Upon learning of this action, Defendant Kirksey, who had the authority to approve the appointment of a monitor, demanded that the monitor be removed. This was before the attack on McKinney. After the attack, when McKinney was attempting to continue teaching and driving, a monitor was again placed on his bus. Again, Defendant Kirksey demanded the removal of the monitor. Given the dangerous environment the District Defendants created, an environment that only grew more dangerous with each day the District declined to provide a remedy, an eventual assault on McKinney was just a matter of time, a virtual certainty.

That assault came on the morning of November 17, 1997, just as McKinney was entering a busy intersection in the morning rush hour. A student took the bus's fire extinguisher from its bracket and began to spray it in McKinney's face, which he continued to do until McKinney was able to make it through the intersection, pull the bus

to the side of the road, and wrest the extinguisher away from him.[20] The massive chemical exposure McKinney received has permanently disabled him.[21] His respiratory system is so damaged that he can no longer sleep lying down in a bed, but must sit up in his chair to sleep. He can no longer breathe normally, has lost his normal speaking voice, and has so little physical endurance that he cannot hold a job. Although McKinney struggled to continue to work for a few more weeks after the assault, he was unable to do so, deprived of physical endurance and a normally functioning respiratory system. As his condition continued to progress, he eventually went on leave. Finally, he left the school system altogether, and is currently unable to work.[22]

* * *

Respectfully submitted,

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[20] R. at 6-7 (Original Complaint at 6-7).

[21] R. at 7, 20-22 (Original Complaint at 7, 20-22).

[22] R. at 20-22 (Original Complaint at 20-22).

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